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Seeking Spies —Or Just Snooping?

The FBI has been embarrassed by its failure to discover spies and traitors whose eventual exposure showed that they had been operating without suspicion for many years.

The FBI should not be roasted for incompetence on this score, though. Spotting an enemy spy, let alone a potential one, is no simple task—especially since the latest species of traitor seems to be motivated by greed rather than any ideological conviction. Political activism has always been easier to identify than the financial difficulties that seem to have driven the modern generation of traitors onto the KGB's payroll.

Individual Americans' financial records have traditionally been regarded as none of the government's business, unless and until there is probable cause to believe a crime has been committed. Spies and gangsters take advantage of the Fourth Amendment's safeguards, to be sure, but the Founding Fathers considered this a necessary trade-off for guaranteeing honest citizens protection from arbitrary meddling or harassment by an all-powerful government.

In hopes of forestalling future espionage surprises—and the criticism that follows—the FBI has asked Congress to give it additional legal weapons for the difficult job of counterintelligence. And Congress, which is sometimes too willing to sacrifice long-cherished constitutional rights to the popular hysteria of the moment, has given the FBI unprecedented access to vast files of detailed information on individual Americans.

The files newly made available include financial data from banks and other financial institutions, as well as telephone records. The information can be obtained by the FBI without the targeted individual's knowledge.

Why does it matter? A congressional expert on privacy rights told us that a skillful investigator can learn more from your checkbook and telephone bills than from weeks of wiretapping and surveillance. The records reveal whom you talked to, what magazines you buy, what organizations you contribute to, where and with whom you have dinner—a vast array of personal details that used to be off-limits to government investigators unless they had good cause to believe you were a criminal.

One amendment to the Intelligence Authorization Act, for example, makes significant changes in the 1978 Right to Financial Privacy Act. That law required that, under most conditions, a bank customer had to be notified and given a chance to object in court if a government agency wanted to look at his financial records. There was an exception for espionage cases: banks could voluntarily turn the requested information over to the FBI.

The new changes make it mandatory for the bank to provide the information when asked—and prohibit the bank from telling the customer.

Our associate Donald Goldberg has learned that the FBI requested this amendment specifically to override a California statute that forbids banks to provide that type of data.

The new provisions do have some protection against wholesale invasions of individual privacy. Before the FBI can obtain financial or telephone records, the FBI director (or a top surrogate) must certify in writing that there are "specific and articulable facts giving reason to believe" that the suspect is an agent of a foreign power.

This is a significantly lower threshold than the "probable cause" required for, say, a court-ordered wiretap. But civil libertarians agree that it does offer better protection than the current vague guidelines sometimes used in espionage cases.

But there are other provisions in the new legislation that raise serious questions about privacy. According to several sources who worked on the new law, these questionable portions were a trade-off to get better protection in other parts of the law.

One provision that particularly worries civil libertarians lets the FBI turn over the records it obtains to any other federal agency it thinks has a legitimate interest in the information: the Internal Revenue Service, the Justice Department, even the CIA, without the individual's knowledge.

Some critics fear that the FBI, in the name of counterintelligence and national security, could once again start amassing huge dossiers on individual Americans and distributing them throughout the government, leading to a "Big Brother" erosion of individual privacy and constitutional rights.

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